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No. 04-1152

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *ET AL.*,
Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, INC., *ET AL.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. § 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students provided to other employers. The question presented is whether the Court of Appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

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BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF has long advocated judicial restraint and separation of powers. In particular, Eagle

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[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

Forum ELDF has a strong interest in defending the power of Congress to attach conditions on spending in order to advance the will of the American people.

SUMMARY OF ARGUMENT

In striking down the Solomon Amendment, the Court of Appeals for the Third Circuit held that institutions may ban the hands that feed them. The court below held that the Solomon Amendment interfered with respondent academic institutions' rights of expressive association and compelled them to express views with which they disagreed. The lower court issued this dramatic ruling despite the fact that the imposition of these requirements was the result of voluntary conduct by the schools: their acceptance of grants or contracts issued by the federal government. The sweeping ruling below is wholly unsupported and adversely affects congressional power and national security.

Like many other provisions of federal law that place conditions on the expenditure of federal funds, the Solomon Amendment prohibits the Department of Defense from providing "by contract or by grant" funds to an institution of higher education if the Secretary of Defense determines that the institution has a "policy or practice" that "either prohibits, or in effect prevents" equal access to campuses or students for the purpose of military recruiting. 10 U.S.C. § 983(b)(1). The Amendment thereby reflects a long-established national policy of ensuring that the military will have continued access to potential recruits at our Nation's universities and institutions of higher education. A more compelling national interest is difficult to imagine.

Numerous precedents of this Court recognize and uphold the power of Congress to place conditions on the receipt of money that it raises and spends. The Court of Appeals' ruling contradicts these rulings and virtually compels Congress to spend money in a manner contrary to the will of

the American people. Nothing in the Constitution mandates this result. Institutions are fully entitled to decline federal grants and subsidies, as some have in the past in other contexts. But once an institution accepts federal subsidies then it hardly violates its constitutional rights to allow access by the same entity that funds the institution: the federal government. Throughout all this, the recipient of the funding remains free to openly disagree with the military and its policies — and, as the record demonstrates, routinely do so.

It is inconsistent with separation of powers for the judiciary to dictate to Congress how it may and may not spend money. The Spending Clause of the Constitution, U.S. Const. Art. I, § 8, cl. 1, confers on Congress the full and exclusive authority over the spending of federal money. Congress can single out institutions for funding, or defunding, without being second-guessed by the judiciary. For example, it is for Congress, not the judiciary, to decide what kind of art to fund. It is for Congress, not the judiciary, to decide what kind of research to finance. Likewise, it is for Congress, not the judiciary, to decide what type of institution to support with subsidies. It is not an abuse of its spending power for Congress to limit funding to institutions that allow access by government representatives for military recruitment.

The Court of Appeals makes much of the universities' rights to "expressive association," but it has no expressive right to exclude its government patrons. What is at issue here is conduct, not speech, as the respondent institutions insist on first taking money, and then blocking access by the provider of the money. Moreover, even if there were an expressive right here, the compelling interest of national security underlying the Solomon Amendment trumps such right. The Court of Appeals' ruling will significantly impair our national security in a time of war, as voluntary military recruitment is essential to the continued viability of our military forces.

The potential effects of the Court of Appeals' ruling outside the present context are likewise troubling. The lower court has essentially granted government contractors and grantees a constitutional right to unilaterally and retroactively abrogate agreements into which they entered voluntarily. Universities and other recipients of federal contracts and grants routinely enter into agreements with the government that impose a variety of requirements, many of which might be said to implicate First Amendment or other constitutional rights. Yet the Court of Appeals' ruling would allow government contractors and grantees to impose a one-sided bargain that was never contemplated by the parties. Recipients of federal funding could enter into contracts with the government knowing full well that the government has implemented policies with which they disagree and attached conditions that they do not intend to honor, remaining silent until they later assert that these voluntary agreements somehow "infringe" their constitutional rights and seek to unilaterally and retroactively impose terms that are more to their liking. There is no such constitutional right to abrogate or rewrite agreements that were entirely voluntary.

ARGUMENT

I. CONGRESS MAY CHOOSE NOT TO FUND INSTITUTIONS THAT DISCRIMINATE AGAINST MILITARY RECRUITERS.

Congress can constitutionally fund some activities but not others. "The government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). This is not viewpoint discrimination. Government "has merely chosen to fund one activity to the exclusion of the other." *Id.* Congress, by choosing where it

allocates its funding, has neither discriminated nor infringed upon the rights and freedoms of Americans.

Congress need not dole out billions of dollars annually to institutions that discriminate against and exclude military recruiters. Under the Spending Clause, Congress has full and unfettered power to decide how to allocate monies raised by the federal government. U.S. Const. Art. I, § 8, cl. 1. Congress could do so as part of its budgetary process each year, expressly identifying which institutions will and will not receive funding for a particular fiscal year. Alternatively, Congress could accomplish the same end more efficiently by attaching conditions to its funding. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987) ("The Constitution empowers Congress to 'lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.' Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.") (quotations omitted).

Accordingly, Congress can choose to spend money on institutions that allow military recruitment, while refraining from spending money on those that exclude such recruitment. The courts should no more compel Congress to fund a particular or type of institution than should the courts interfere with congressional control over taxation. Justice Kennedy, in a concurrence joined by Justices Rehnquist, O'Connor and Scalia, warned against embracing "an expansion of power in the federal judiciary ... [that] disregards fundamental precepts for the democratic control of public institutions." *Missouri v. Jenkins*, 495 U.S. 33, 58-59 (1990) (Kennedy, J., concurring).

A congressional refusal to fund a specific activity is fully constitutional, and is not to be condemned as a penalty on alternate activities. *See Harris v. McRae*, 448 U.S. 297 (1980) ("A refusal to fund protected activity, without more,

cannot be equated with the imposition of a 'penalty' on that activity."); *John Glenn Presidential Committee, Inc. v. Federal Election Com.*, 822 F.2d 1097, 1100 (D.C. Cir. 1987) ("A legislature's decision not to subsidize the exercise of a fundamental right — a fortiori, a decision to place dollar limits on public subsidies — does not infringe that right."). The government, whether as speaker or as policymaker, may selectively fund programs considered to be in the interest of its citizenry, without any obligation to fund or even encourage alternatives.

It is axiomatic that the government's "decision not to subsidize the exercise of a fundamental right does not infringe on that right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983). "These are scarcely novel principles. We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* A long line of precedents of this Court illustrates that the legislature's choice of funding does not constitute an unconstitutional discrimination or infringement of rights in programs denied subsidization. As in *Rust* and in the more recent case of internet filtering in public libraries, "the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *United States v. Am. Library Ass'n*, 539 U.S. 194, 211 (2003).

The congressional decision not to fund universities that discriminate against military recruiters cannot be described as "viewpoint-based" discrimination. The prohibiting of military recruiting is conduct, not merely speech. As this Court made clear with respect to the burning of draft cards, conduct is not entitled to the protections of free speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea."). Where, as here, the government subsidy is not based

on an unconstitutional viewpoint requirement, Congress may support some universities but not others. "When the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). *See also L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 43 (1999) (Ginsburg, J., concurring) ("But if the award of the subsidy is not based on an illegitimate criterion such as viewpoint, California is free to support some speech without supporting other speech.").

As Justice Souter wrote in dissent in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, if "public university's funding determinations ... are made on the basis of a reasonable subject-matter distinction, but not on a viewpoint distinction, there is no violation." 515 U.S. 819, 893 n.12 (1995) (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993), quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)). Congress has made a similar, and equally constitutional, distinction in deciding which institutions to fund. The court below erred in applying the exacting standard of strict scrutiny to the congressional funding requirement of equal access for military recruiters, as embodied in the Solomon Amendment. *FAIR v. Rumsfeld*, 390 F.3d 219, 235 (2004).

"The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that — unlike direct restriction or prohibition — such a denial does not, as a general rule, have any significant coercive effect." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 590 (1998) (Scalia, J., concurring) (inner quotations omitted). The decision below should be reversed.

II. THE COURT BELOW VIOLATED SEPARATION OF POWERS BY ORDERING CONGRESS TO FUND AN ACTIVITY.

Congress has wide latitude to set spending priorities. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). In broadly construing the Spending Clause, Justice Cardozo wrote in favor of great deference to Congress on spending issues:

> The discretion [over spending] is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.

Helvering v. Davis, 301 U.S. 619, 640-41 (1937) (quotations omitted).

The nature of the governmental interest here reinforces the need for deference to Congress under the separation of powers. The Constitution expressly confers authority over military matters to the Legislature and the Executive. Congress alone is authorized to "raise and support an Army" and "provide and maintain a Navy." U.S. CONST. Art. I, § 8, cl. 12-13. It is also charged with the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id.* Art. I, § 8, cl. 11. The President of the United States is given the power to act as "Commander in Chief of the Army and Navy of the United States." *Id.* Art. II, § 3, cl. 1. The Judiciary, in contrast, is given no express role with respect to the military. Indeed, this Court has observed that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Accordingly, in "perhaps no other area has the

Court accorded Congress greater deference" than "in the context of [its] authority over national defense and military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

Here, the coordinate branches have provided a specific and defined remedy for a specific and defined problem — the military's lack of access to institutes of higher education for recruiting purposes and the concomitant impairment of our national security. Nor did they do so lightly. Before passing the Solomon Amendment, Congress commissioned a study that "found 140 institutions of higher education that, for some reason or another, whatever reason, have denied recruiters access to their campuses." 140 Cong. Rec. S8172 (July 1, 1994) (Sen. Nickles). Members of Congress concluded that the lack of access represented a significant threat to national security, observing that "recruiting is the key to our all-volunteer military forces," 142 Cong. Rec. 16,860 (1996) (Rep. Solomon), that "[c]ampus recruiting is a vitally important component of the military's effort to attract our Nation's best and brightest young people," *id.* at 12,712 (Rep. Goodlatte), and that the universities that were denying access to recruiters were significantly "interfer[ing] with the Federal Government's constitutionally mandated function of raising a military," 141 Cong. Rec. 595 (1995) (Rep. Solomon).

By mandating that Congress fund institutions that prohibit the military from gaining access to their campuses, the Court of Appeals interfered not only with the Executive's prerogative to conduct military affairs, but also with an established congressional policy sanctioning that particular exercise of Executive power. "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), *Schlesinger v. Councilman*, 420 U.S. 738, 757-

758 (1975), *Chappell v. Wallace*, 462 U.S. 296 (1983)). "It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers." *Gilligan v. Morgan*, 413 U.S. at 10-11.

This Court put it best in *Rostker v. Goldberg*: "[Judicial] deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." 453 U.S. at 70. The judiciary should defer to Congress in this matter.

III. THE SOLOMON AMENDMENT DOES NOT VIOLATE ANY RIGHTS OF EXPRESSIVE ASSOCIATION.

The lower court merely assumed without any analysis that "educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." *FAIR v. Rumsfeld*, 390 F.3d 219, 231 (3d Cir. 2004) (quotations omitted). But Congress expressly recognizes an exception for bona fide institutional values.[2] Beyond that, the actual conduct of a university in taking federal subsidies is more meaningful than admitting recruiters on a basis equal to numerous other recruiters as mandated by law. When values truly conflict between a donor and a recipient, the recipient remains free to express its disapproval by declining the subsidy. In fact, secular

[2] An exception may be found in institutes of higher education that have a religious affiliation and are therefore created to promulgate an established set of religious values. Such institutions may indeed constitute "expressive associations." However, the Solomon Amendment recognizes this possibility and exempts institutions of higher education that have "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2).

universities and other academic institutions do not exist to sponsor a single ideology or viewpoint, but rather serve as fora for wide-ranging and open debate in which individuals having disparate viewpoints may all participate.

Even if there were a bona fide First Amendment right at stake here, recruitment to support our Nation's volunteer military services is a compelling need that justifies infringement on that right. Our Nation is at war, and in the past Congress has exercised its power to forcibly draft college students against their will. Given that authority, Congress surely possesses the far lesser power of supporting an all-volunteer military by forbidding discrimination against military recruiters by institutions that accept federal funding.

A. Military Recruiting at Universities Does Not Implicate "Expressive Association."

Military recruiting activities at institutions accepting federal subsidies do not implicate expressive rights of association outlined in *Boy Scouts of Am. v. Dale*. 530 U.S. 640, 653 (2000). The district court correctly concluded that recruiting activities did not implicate any expressive activity, but the Court of Appeals erred in making the opposite determination. The Court of Appeals was mistaken in finding a constitutional violation because "[m]ilitary recruiters visiting law school campuses undoubtedly speak to students about the benefits of a career in the military, and the Solomon Amendment requires law schools to accept this speech." *FAIR*, 390 F.3d at 237.

"[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 566-67 (1995). Here, those facts demonstrate that the recruiting activities at issue do not implicate any First Amendment concerns. The fact that universities have agreed to give military recruiters equal access to their facilities in

exchange for government funds cannot be construed as any "endorsement" of the military's views or policies. *See FAIR v. Rumsfeld*, 390 F.3d at 257 (Aldisert, J., dissenting). This is particularly true given that observers understand that "the economic consequences of the Solomon Amendment" provide an incentive to institutions of higher education to afford military recruiters access. *Id.* "In contrast to the scoutmaster in *Dale*, recruiters do not purport to speak 'for' — and cannot reasonably be understood to be speaking 'for' — the law schools that they are visiting." *Id.* at 260.

The Court's rulings under the religion clauses of the First Amendment are instructive here. The Court has consistently held that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). This is particularly true where the forum is open to a "broad class of nonreligious as well as religious speakers." *Id.* In *Widmar*, for example, the Court concluded that it was doubtful that anyone "could draw any reasonable inference of University support [for private religious speech] from the mere fact of [supplying] a campus meeting place" when a university made its facilities available for meetings of "over 100 recognized [private] student groups," thereby creating an open "public forum." *Id.* at 276-77. *See also Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 766 (1995) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."); *Board of Educ. of Westside Community Schools v. Mergens By and Through Mergens*, 496 U.S. 226, 231, 246-47, 250 (1990) (when school permitted "30 recognized [student] groups" to "meet after school hours on school premises" establishing a "limited open forum," students were "likely to understand that [the] school does not endorse ... student speech").

So, too, there would be no endorsement of military policies by allowing equal access to military recruiters.

Hundreds if not thousands of recruiters routinely participate in recruiting activities occurring on campuses, and the vast majority of these recruiters have nothing to do with the military. There is simply no basis to draw any conclusion that affording military recruiters "equal access" to campus constitutes any "endorsement" of their views. *See Widmar*, 454 U.S. at 274. Again, this is particularly true given that the respondents have "taken pains to disassociate" themselves from the military's policies and viewpoints. *See Rosenberger*, 515 U.S. at 841.

As the district court found, the fact that these law schools provide similar assistance to other recruiters dispels any notion that their conferring equal access to military recruiters constitutes any "endorsement" of the military's position. "[W]hen a law school does all these things for every other potential employer in the context of a large recruiting function," there is no "obvious endorsement[] of a particular ideological point of view." *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 310 (D.N.J. 2003).

More fundamentally, "the Solomon Amendment does not directly restrict speech, making this case factually different from prior cases applying the doctrine of unconstitutional conditions." *Id.* at 297. The Amendment does not, for example, "directly or entirely exclude a point of view." *Id.* at 300. The universities challenging the law, members of their faculty, employees, and students are all free to criticize the military or its policies, and indeed frequently do so. *See id.* at 302. They "are free to proclaim their message of diversity and tolerance as they see fit, to counteract and indeed overwhelm the message of discrimination which they feel is inherent in the visits of the military recruiters." *Id.* at 305. The law does not seek to suppress any speech that may be antagonistic to the government's policies. Rather, the statute merely guarantees that the military will have equal access to the institutions' facilities.

The First Amendment is implicated only where action is "sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409-10 (1974). As the district court found in the proceedings below, "if there is any expressive component to recruiting, it is entirely ancillary to its dominant economic purpose." *FAIR*, 291 F. Supp. 2d at 308. "Because there is little that is inherently expressive about the act of permitting military recruiters access to campus (or providing assistance to recruiters), the statute targets conduct, not speech." *Id.* at 311.

Similarly, the "assistance" that the law schools claim they are being compelled to give military recruiters does not implicate or interfere with expression. "[T]he law schools' actions in assisting military recruiters are insufficiently imbued with elements of communication to require the protection of the First Amendment." *Id.* at 309. In sum, "[t]he Solomon Amendment does not compel law schools to say anything." *Id.* In particular, there is no requirement that the law schools "endorse" any of the militaries policies; nor is there any "restriction on speech or conduct disclaiming any such endorsement." *Id.*

Finally, the Solomon Amendment does not require universities to "accept the military recruiters as members of their organizations" or "bestow upon them any semblance of authority." *Id.* at 305. "The military recruiter, by definition, is not a member of the law school community. He or she is a visitor and, in fact, a periodic visitor among many competing visitors." *Id. See also FAIR*, 390 F.3d at 260 (Aldisert, J., dissenting) (observing that "the Solomon Amendment simply does not impinge on the right of educational institutions to determine their membership" and "does not purport to tell colleges and universities whom to admit as students or whom to hire as professors or administrators").

The situation here is therefore completely different from that in *Dale*. There, the Court observed that there was a "forced inclusion of an unwanted person in [the] group."

Dale, 530 U.S. at 648. Moreover, the forced inclusion was particularly significant: "The application of the state anti-discrimination law required the Boy Scouts to accept a gay rights activist not merely as a member but as an assistant scoutmaster." *FAIR*, 291 F. Supp. 2d at 305. Here, in contrast, the Solomon Amendment does not require the universities to accept any point of view.

B. The Government's Significant and Compelling Interest in Ensuring National Security Overrides any Alleged Impairment of Expressive Activity at Federally Funded Institutions.

A compelling governmental interest, such as protecting national defense, can justify infringement on a constitutional right. *See Dale*, 530 U.S. at 656. The freedom of expression may be "overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 648 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

Here, the governmental interest at issue is of the utmost importance, as recognized by the trial court below. *See FAIR*, 291 F. Supp. 2d at 312 (finding that "the Solomon Amendment furthers an important government interest"). In fact, even the Court of Appeals recognized that "the Government has a compelling interest in attracting talented military lawyers." *FAIR*, 390 F.3d at 234. However, it then failed to give this compelling interest proper consideration.

This Court has long recognized that "the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances." *United States v. O'Brien*, 391 U.S. 367, 381 (1968). In support of this important governmental function,

Congress has repeatedly enacted legislation that "much like the Solomon Amendment, authorized the withholding of defense funds from schools that maintained a policy barring military recruiters or otherwise eliminated the Reserve Officers Training Corps program." *FAIR*, 291 F. Supp. 2d at 278 (citing Pub. L. No. 92-436 § 606(a), 86 Stat. 734, 740 (1972); Pub. L. No. 91-441, § 510, 84 Stat. 905 (1970); Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968)). The Court of Appeals failed to properly consider the significance of this longstanding government interest.

C. Most Secular Universities and Other Institutions of Higher Education are Demonstrably Not "Expressive Associations."

Secular universities and institutions are typically defined by an openness to a diversity of opinion, which is sometimes described as "academic freedom." They are presumptively not organizations that engage in "expressive activity" that "seeks to transmit ... a system of values." *Dale*, 530 U.S. at 650. Secular institutions of higher education are dedicated to a wholly different purpose: to expose students to a *range* of value systems and ideas, without imposing any one ideology. They are therefore completely unlike organizations that are organized around a single ideology and established to promote a single set of values.

A prime example of an "expressive association" is the Boy Scouts of America, which was the subject of this Court's ruling in *Dale*. The Boy Scouts organization was established to inculcate a specific set of principles. Those principles were embodied in a Scout oath and Scout law. The Court held that requiring the Boy Scouts to admit homosexuals as scout masters would conflict with its consistently asserted position.

Secular universities and other institutions of higher education, in contrast, are not organized around any single

ideology. As this Court has recognized, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). Universities facilitate "the free and open exchange of ideas" and "foster vibrant campus debate among students." *Board of Regents of University of the Wisconsin System v. Southworth*, 529 U.S. 217, 234 (2000). Accordingly, they routinely "encourage a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 834 (1995). In sum, "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

As this Court explained in *Rosenberger*, the very origin and mission of the secular university distinguish it from expressive associations. "In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn." 515 U.S. at 835. *See also Healy*, 408 U.S. at 180-181 ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. ... Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association.").

Such "spontaneous assemblages" dedicated to open debate are fundamentally different from "expressive associations" that are organized to promote a guiding set of beliefs or principles. Thus, the Court in *Rosenberger* held that the exclusion, or even the disparagement, of particular viewpoints was fundamentally at odds with the function of a secular university: "The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." 515 U.S. at 836.

Indeed, because many secular universities are public institutions subject to constitutional limitations imposed upon government actors, there are certain restrictions on their ability to promote a particular ideology. For example, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Id.* at 828. "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* As a result, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829. Nor may the government "discriminate against speech on the basis of its viewpoint." *Id.*

This Court has held, for example, that the expulsion of a student for lewd expression in a newspaper that she sold on campus pursuant to university authorization was unconstitutional. *Papish v. University of Missouri Board of Curators*, 410 U.S. 667, 667-68 (1973). It would be inconsistent to hold that the same school could exclude someone for espousing the values of our Nation's military. In another example, this Court has held that the denial of university recognition and concomitant benefits to a political student organization was unconstitutional. *See Healy v.*

James, 408 U.S. at 174, 176, 181-182. In yet another case, this Court has held that where a university administers mandatory student fees, there is a "requirement of viewpoint neutrality in the allocation of funding support" that prohibits universities from discriminating against or excluding certain viewpoints. *Southworth*, 529 U.S. at 233. *See also Rosenberger*, 515 U.S. at 841. Finally, this Court has held that a school may not deny access to its facilities to some, but not other, groups based on their viewpoint. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393 (1993). In light of all these precedents, these schools could not constitutionally bar an advocate of our military, or a recruiter for it.

Respondents' attempt to draw analogies between secular universities dependent on federal subsidies or even state funding and private organizations like the Boy Scouts must fail. The Boy Scouts and other private associations remain free to regulate their members in order to inculcate their particular value system and to affirmatively eschew viewpoints that are inconsistent with their beliefs. If anything, respondents' *exclusion* of the military — not the Solomon Amendment — offends the values inherent in the First Amendment.

Finally, the established practice of universities and other institutions of higher education demonstrates that they are not "expressive associations." Such institutions host speakers and foster debate among their student bodies that involve positions directly contrary to those espoused by some members of the faculty or administration. In particular, universities and other institutions of higher education are not established to promote an anti-military or even anti-discrimination ideology. Even as to the merits of the present appeal, law schools around the country have sponsored panels at which opposing viewpoints regarding the military's policies and the Solomon Amendment have been fully debated. These established practices demonstrate that institutions of higher education are fundamentally

different from the organizations this and other courts have found to engage in expressive association.

IV. THE DECISION BELOW WOULD ALLOW GOVERNMENT CONTRACTORS AND GRANT RECIPIENTS TO UNILATERALLY AMEND THEIR AGREEMENTS AND IMPOSE ONE-SIDED BARGAINS THAT WERE NEVER CONTEMPLATED BY THE PARTIES.

The implications of the Court of Appeals' decision beyond the present dispute are sweeping and dramatic. The appellate decision below would allow government contractors and grant recipients to unilaterally abrogate terms of agreements with the government to which they voluntarily consented. In the process, it would create out of whole cloth a previously-unrecognized *constitutional right* to impose one-sided bargains that the parties never contemplated — all at the expense of the federal government, and ultimately federal taxpayers.

The Solomon Amendment represents merely one example of the many conditions imposed upon the recipients of federal grants and contracts that may now be alleged to touch upon First Amendment rights of speech and expression. For example, government contracts and grants routinely contain provisions that *require* recipients to submit certain reports to the government in order to ensure that government funds are properly spent and impose certain auditing requirements. *See* 32 C.F.R. § 32.26. Moreover, they require that recipients "maintain written standards of conduct governing the performance of ... employees engaged in the selection, award, or administration of a contract supported by Federal funds." 32 C.F.R. § 32.42.

Similarly, the government routinely imposes conditions and requirements that seek to promote various policy goals. For example, the government requires the establishment of procurement procedures that give preference to the extent

possible to products and services that "conserve natural resources and protect the environment and are energy efficient." 32 C.F.R. § 32.44. *See also id.* § 32.49. Similarly, it requires that "[p]ositive efforts shall be made by [contract] recipients to utilize small businesses ... whenever possible." 32 C.F.R. § 32.44. Finally, government contracts often contain provisions requiring compliance with equal opportunity guidelines contained in Executive Orders, certain minimum wage payments, reporting of environmental contamination violations, prohibitions on the use of federal funds in lobbying, and disclosure of "any lobbying with non-Federal funds." 32 C.F.R. pt. 32 App. A. The Court of Appeals' ruling, if affirmed, would allow government contract and grant recipients to challenge governmental conditions in court to possibly abrogate their obligations. Indeed, they would arguably have a *constitutional right* to do so.

No such right exists, however, under established law. To the contrary, as explained in Point I above, the Court has repeatedly affirmed the right of the government, like any other party, to impose limits or conditions on the use of its funds. *See Rust v. Sullivan*, 500 U.S. 173 (1990); *see also United States v. American Library Ass'n*, 539 U.S. 194 (2003). The Solomon Amendment, like many other federal enactments, offers potential recipients of federal grants and contracts a simple and voluntary choice: "If you do not like the Armed Forces, if you do not like its policies, that is fine. ... But don't expect federal dollars to support your interference with our military recruiters." 140 Cong. Rec. H3861 (May 23, 1994) (Rep. Solomon). This choice is no different from many other choices faced by potential recipients of the government's largesse, or recipients of many types of private donations. And the putative plaintiffs here have voluntarily *agreed* to undertake certain obligations.

Respondents now seek to deprive the federal government of the benefit of its bargain, claiming that somehow when

they voluntarily entered into these arrangements, their "rights" were violated. There simply is nothing in the Constitution, never mind notions of fundamental fairness, that would allow individuals or universities to impose such a one-sided, after-the-fact bargain. When respondents entered into agreements with the federal government or accepted government grants, they fully *knew* of the federal policies to which they object, yet they voluntarily *chose* to associate themselves with the federal government, and in particular the Department of Defense. Now they seek to unilaterally void obligations to which they *agreed* while *maintaining* these beneficial relationships. If institutions wish to avoid the requirements imposed by the Solomon Amendment, then their solution is simple: they may refrain from taking federal funds in the specified programs. Instead, respondents seek to assert a purported constitutional right to avoid obligations to which they voluntarily consented, and their argument must be rejected.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court uphold the constitutionality of the Solomon Amendment, and reverse the Court of Appeals' decision.

Respectfully submitted,

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